It seems to me quite clear that this clause also has no relation whatever to the monthly allowances. The word "income" in clause 18 means the income of the share and has no connection with the monthly allowances which are charged upon or payable out of the income of the whole estate for a period of twenty years before the shares are ascertained. The monthly allowances are therefore not subject to the restraint clause.

With regard to the shares, the matter is different and perhaps more difficult. It appears evident that, although provision is made for partition as a method of division into shares, the estate will almost certainly be converted into money in order to carry out that division in its entirety. Consequently I think the shares must be regarded as gifts of personal estate. The trustees are, as soon as may be after the date of distribution, to make certain payments, and thereafter upon trust to divide the whole of the residuary estate, either by sale and realisation or partition or both, into twenty-six equal shares and to appropriate, give, transfer or pay certain shares to named persons. There appears to be no gift except in this direction to pay. If the clause stood alone the named persons would have no transmissible interest unless they survived the testator by the twenty years. *Re Eve*: *Belton* v. *Thompson*, 93 L.T. 235. The subsequent clauses 12-14 are not in conflict with clause 11 but are attempts to provide that there shall be some person ready to take when the period expires. Then to make his intention abundantly clear the testator declares, somewhat unnecessarily in my opinion, by clause 15 that no share of any person deriving any share, benefit or interest under the will shall be deemed to have become vested in such person unless such person shall be living at the expiration of the said period of twenty years. Apart then from the view I take that the time is annexed to the substance of the gift and that, as a consequence, the gift is contingent upon the donee surviving, this clause would also make the gift of a share a contingent one. Everything really depends on the expiration of the twenty years.

The argument based on the use of the expression "shall be deemed" in clause 15, which argument is derived from the use of that expression in statutes, is not, I think, applicable in the case of a will. When the expression is used in a statute the Court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to: *Beal*, 3rd Ed. 342, citing *Ex parte Walton*, (1881) 17 Ch.D. 746 at p.756.

But even applying such a rule of construction, I am driven to the same conclusion. The testator enacts, so to speak, that interests which might be regarded as vested interests, are to be deemed not to be vested. The purpose and the persons affected are sufficiently indicated and effect has to be given to his expressed intention.

It has also been submitted that the words "the trust hereinbefore contained in favour of such person as aforesaid shall immediately thereupon cease and determine and my said will shall be read and construed in all respects as though such person had died on the day preceding the date of distribution," which form the concluding passage of clause 18, do not make a valid gift over. I think, however, most of the argument on that submission was directed upon the assumption of the restraint clause applying to the gifts of income, and, as I have held that the clause does not so apply very little remains to be said upon that submission. In so far as the restraint will operate upon an attempted disposition of an expectant share of residue, it appears to me, having regard to clause 12, that there is an effective gift over.

As far then as the monthly allowances are concerned, the restraint clause is inapplicable as far as the plaintiffs' shares, the restraint clause would operate upon an attempt to alienate to the extent that the plaintiffs would lose their expectant shares.

Order accordingly.

Solicitors for the Plaintiffs—*Donaldson & Burkinshaw.*

Solicitors for the Defendants—*Allen & Gledhill.*

[APPELLATE CRIMINAL JURISDICTION.]
HORNE, J.
May 22, 1937.

LAM HENG v. REX

[SINGAPORE MAGISTRATE'S APPEAL No. 25 of 1937]

Criminal procedure—summary trials—right of Counsel for defence to address the Court—Criminal Procedure Code (Cap. 21) Ss. 5, 182 (j), 184.

In summary trials the only address to the Court to which an accused or his advocate is entitled as of right may be made at the opening of the case for the defence. Counsel may at this stage submit that there is no case to answer in law. Such an address may by leave of the Court be postponed, as when witnesses are to be called, until the conclusion thereof. Where, however, an accused is the sole witness as to facts and at the conclusion of the prosecution's case elects to give evidence, such an address is of necessity postponed until after he has given his evidence.

MAGISTRATE'S APPEAL.

T. W. Ong for the appellant.

Storr, Crown Counsel, for the respondent.

Cur. Ad. Vult.

HORNE, J.—This is an appeal against conviction and sentence of 3 months R.I. and 6 months police supervision, and whatever may be said about the conviction, the Magistrate ought, in my opinion, to have passed a lesser sentence against the appellant in view of the fact that there was no previous conviction against him. In any event there was no jurisdiction to make

the order for police supervision, and as the Magistrate considered that 3 months R.I. was a proper sentence for the appellant's co-accused who had one previous conviction, then obviously some distinction should be made or reasons for not making that distinction should be recorded. *R.* v. *Canham*, 5 Cr. App. R. 110. Accordingly the appellant having served six weeks of the sentence, was ordered to be released at the hearing and judgment was reserved.

There are several grounds of appeal. Firstly that the Magistrate refused to allow the appellant's advocate to sum up the evidence for the appellant (who was the second accused). The reasons given for this refusal are that he had too many cases to try on that day and that in a summary trial counsel for the accused could not sum up his case without the Magistrate's consent. Secondly, that the Magistrate had refused to allow the appellant to call a witness as to the appellant's good character. Those are the principal grounds of appeal. The other grounds may be summarised by saying that conviction against the weight of evidence and that the prosecution had failed to satisfy the burden of proof.

As to the first ground, it appears to me to be a fundamental principle of British justice that no Court shall determine an issue until it has heard both sides, and that principle cannot be limited in its scope at the will of the Court, especially on the ground that there are other cases waiting to be heard. As Lord Kenyon C.J. put it so long ago as 1801, "Justice requires that a party should be duly summoned and fully heard before he is condemned." *R.* v. *Stone*, 1 East, 649. Certainly there is a discretion in this sense, that if an advocate is wasting the time of the Court by an entirely unnecessary and irrelevant address the Court may order him to sit down. The local legislation does not, however, express this principle with the clarity to be expected in modern legislation. Section 250 of the Criminal Procedure Code provides that every person accused before any criminal Court may of right be defended by an advocate. That section is not in derogation of any other rights the accused may have, such as giving evidence himself, calling witnesses, addressing the Court and making an unsworn statement. And all his rights will be subject to the procedure laid down for the particular Court before which he comes to be tried. Section 182 prescribes the procedure at summary trials. Sub-sections (i), (j) and (k) of that section are not exhaustive; (j) provides for an accused being called upon to enter his defence and to produce his evidence, and to recall witnesses present in Court; (k) allows the accused to put in a written statement. It is to be noted that this section is silent on the subject of addressing the Court. But section 184 provides "that without the permission of the Court a complainant," and I would add, or his advocate, "shall not be entitled to make any observation in reply upon the evidence produced by the accused, nor shall the accused," and I would again add, or his advocate, "be entitled to make any observations in reply upon the evidence, if any, produced by the complainant in reply." That last sentence imports the right found in the Summary Jurisdiction Act 1848 of the prosecution giving evidence in rebuttal. There is not the same strictness in this matter in summary trials as there is in trials at bar.

From section 184, therefore, it would appear that the discretion of the Magistrate to refuse to hear the accused or his advocate is limited to refusing him an address on the evidence called by the prosecution in rebuttal of the evidence of the accused. Nevertheless section 182 is silent as to at what stage of the proceedings the accused or his advocate may address the Court. That section could be improved by the addition of a subsection saying in effect that a complainant or his advocate was entitled to address the Court on opening his case, and that the defendant or his advocate was entitled to address the Court either on opening his case or at its conclusion. The F.M.S. Criminal Procedure Code has an adequate section. It goes even further than my suggestion, for it has the same effect as Section 2 of Denman's Act (28 & 29 Vict. C. 18).

The general section, viz. section 5 of the Criminal Procedure Code states that "as regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force in the Colony the law relating to criminal procedure for the time being in force in England shall be applied so far as the same does not conflict or is not inconsistent with this Code and can be made auxiliary thereto."

I turn therefore to section 14 of the Summary Jurisdiction Act 1848 which, after describing the procedure for hearing the complainant and his witnesses, continues thus:—"and also to hear the defendant and any such witnesses as he may examine and such other evidence as he may adduce in his defence and also to hear such witnesses as the prosecutor or complainant may examine in reply, if such defendant shall have examined any witnesses or given any evidence other than as to his the defendant's general character; but the prosecutor shall not be entitled to make any observations in reply upon the evidence given by the defendant nor shall the defendant be entitled to make any observations in reply upon the evidence given by the prosecutor or complainant in reply as aforesaid; and the said Justice or Justices having heard what each party have to say as aforesaid" and the witnesses or evidence so adduced shall consider etc., and determine the matter. The latter part of that Section is the same as section 184 of the C. P. Code but for the effect of the first part we have to rely on Sec. 5 of the C. P. Code.

The point to be noted is that this section gives each party a right to be heard as distinct from giving evidence. The expressions are (a) "shall hear the complainant or prosecutor"; (b) and also to hear the defendant; and (c) "and having heard what each party have to say as aforesaid." When that Act became law a defendant could not give evidence, but he could address the Court at the opening of his case, and in that address he could criticise the evidence brought against him and incorporate therein his own unsworn statement and if he called no witnesses as to the facts but only as to his general character, the complainant or prosecutor had no right to a further address. In practice, however, the parties were allowed a reply on a point of law. The combined effect of section 5 of the Criminal Procedure Code and section 14 of the Summary Jurisdiction Act 1848 is to give the accused or his advocate the right to address the Court when opening his defence and not the right to sum up his evidence at the close thereof. He can of course always also submit that there is no case to answer in law.

In this appeal there is nothing on the record to show whether Mr. Ong requested the leave of the Magistrate to postpone his address until after his witnesses had been heard. This course is one that is often, I may say almost generally, adopted in practice under the Summary Jurisdiction Act 1848, and is a convenient one. But the advocate is not entitled to adopt it as of right. Had this been a case in which the defendant had called witnesses other than himself and Mr. Ong had applied at the proper stage of the proceedings, viz. at the close of the prosecution case, to postpone his address and had been refused, he could then nevertheless claim a right to be heard and if the Magistrate had then refused to hear him, that refusal would have been, in my opinion, a ground for considering whether the conviction should stand. Sohoni p.756 goes further and quotes cases showing that the conviction after such a refusal has been quashed, but whether on the ground of irregularity or illegality is not clear and the cases there cited are not available.

Section 5 takes us much further than the Summary Jurisdiction Act 1848; it provides that the gaps in our Criminal Procedure Code may be filled by applying the law relating to criminal procedure for the time being in force in England. Since 1848 various changes have been made most of which find an appropriate place in the law of the Colony, such as the right of an accused to give evidence. With regard to trials in the Supreme Court, section 205 (3) Criminal Procedure Code provides that if an accused person elects to give evidence his evidence shall be taken before the other witnesses called for his defence. The Code is however silent as to what is to happen at summary trials. The expression in section 182 sub-section (j) "the accused shall be called upon to enter upon his defence" cannot be extended so as to apply the rule as stated in section 205 which specifically applies to the Supreme Court only. But nothing is said in the Code as to the situation that arises so often in practice, viz. that the accused is the only witness called for the defence as to the facts. Section 205(1) Criminal Procedure Code states the accused or an advocate may open his case at the conclusion of the case of the prosecution. So presumably in the Supreme Court an accused can open his case, call himself as sole witness and then sum up his case. But in summary trials, upon my view of sections 182 and 184 read in the light of the English practice under the provisions of section 5, there can be only one address as of right. I therefore think that, as sub-section (j) of section 182 is not at all specific as to when this address should be given, the English practice ought to be followed. That practice is, that the address is generally made at the opening of the case for the defence and may by leave of the Court be postponed, when witnesses are to be called, until the close thereof; but when the accused is the only witness as to facts, he has to be called under section 2 of the Criminal Evidence Act 1898, immediately after the close of the prosecution's case, and consequently the sole address which an accused or his advocate is allowed as of right at summary trials is necessarily postponed until after the accused has given his evidence.

In this appeal, although the two accused were tried together, it does not necessarily follow that there was only one defence. As far as the defence of No. 2 accused, the appellant, is concerned the record shows that he is the only witness as to the facts for his own defence. He was examined by Mr. Ong, his advocate, and cross-examined by the prosecution. It cannot be said that the witness Wan Ah Choon is called by the appellant. The record shows that this witness was not examined in chief by the appellant's advocate. Consequently when the appellant's evidence was concluded his advocate had the right to address the Court, and he should have been allowed by the Magistrate to do so. The interposition of a witness as to character would not affect the matter. Section 250 of the Criminal Procedure Code declares "that every person accused before any criminal Court may of right be defended by an advocate." The deprivation of an accused person of something which he is by law entitled to as of right appears to me to be more than a mere irregularity of procedure. And even if it does not amount to an illegality in the sense that the trial was conducted in a mode contrary to express statutory provision, it is a grave and material irregularity and the refusal to hear the advocate is so contrary to long established principle, that there is no alternative but to quash the conviction. The conviction is therefore quashed. I do not consider, upon the evidence on the record, that there is any ground

for a re-trial, and as the accused has already served six weeks imprisonment there will be no order for a re-trial.

With regard to the refusal of the Magistrate to admit the evidence of good character, which was proposed to be called, the passage from section 14 of the Summary Jurisdiction Act 1848 would show that it was the established rule to permit such evidence to be given. Evidence of general reputation having reference to the nature of the charge is admissible. See Cap. 13 sec. 53. It lays the foundation for the presumption of innocence and the reason for its admission is the desire to administer the law with mercy as far as possible. See *R.* v. *Rowten* (1865) 34 L.J.M.C. 57. Sometimes it may be important, as it may give credibility to the account given by the accused of the transaction out of which the charge against him arises. The reason for rejecting this evidence, viz. that "this case is a question of fact," is clearly unsound and the rejection was improper and it is difficult to say that with the absence of an address which might make it clear to the Magistrate that the defences of the two accused were not identical, this rejection has not occasioned a failure of justice.

On these two grounds the appeal is allowed and the conviction quashed.

Appeal Allowed. Conviction Quashed.

[ORIGINAL CIVIL JURISDICTION]

HOWES, Ag. C.J.

May 24, 1937.

CHEOK CHIN HUAT & ORS.

v.

CHEOK CHIN SOO & ORS.

[SINGAPORE SUIT No. 4 of 1937]

[SUMMONS IN CHAMBERS No. 150 of 1937]

Will of Chinese—construction—"and their families"—meaning of—adopted sons.

A testator by her will devised to her trustees a house upon trust to permit the same to be used as a family house by certain named beneficiaries "and their families" for a period of twenty-one years from the date of her death. On the question whether the word "families" included the adopted children of beneficiaries named in the devise,

Held, that there was no context in the will which justified extending the primary meaning of "family" to children other than lawful children.

SUMMONS IN CHAMBERS adjourned into Open Court under an Order of De Buriatte, J.

The questions propounded for determination by the Court sufficiently appear from the judgment below.

Withers Payne for applicants (2nd and 3rd defendants), two of the trustees, contended that as the Testatrix died leaving lawful sons and their lawful children the devise of No. 23 Duxton Hill to the trustees upon trust that they should permit the same to be used as a family house by *inter alios* the 1st and 2nd plaintiffs and their families did not by its use of the words "their families" include the 3rd, 5th and 7th plaintiffs being adopted sons of the first and second plaintiffs respectively. He contended that "their families" must be construed to mean their lawful children or their respective wives and lawful children and that there was nothing in the will to displace the primary meaning of the word. He referred to *Pigg* v. *Clarke*, 3 Ch.D. 674; *re Terry's Will*, (1854) 19 Beav. 580; *re Muffett*, (1886) 55 L.T. 671; L.J. Ch. 600. He contended that the Court could not put itself in the position of the testatrix but must interpret the actual words of the Will having regard to the family of the testatrix at the time of the making thereof and referred to *Quaik Kee Hock* v. *Wee Gook Neo*, (1886) 4 Ky. 128, 130 and to *re Tan Cheng Siong deceased*, (1937) 6 M.L.J. 87.

C. J. Koh for the 1st defendant referred to *Dorin* v. *Dorin*, L.R. 7 H. L. 568; *Khoo Hooi Leong* v. *Khoo Hean Kwee*, (1926) A.C. 529 at 538.

Mark Morrison for respondents (3rd, 5th and 7th plaintiffs) adopted sons of 1st and 2nd plaintiffs, the lawful sons of the testatrix, contended that "family" in the Will of a Chinese includes adopted sons who amongst this race are treated as the members of the family. In the case of such a Will, the primary meaning of "family" is displaced.

Cur. Ad. Vult.

HOWES, AG. C. J.—This summons was, by order of de Buriatte J. adjourned into Court for the determination of the issue raised in prayer one, viz:—

> (1) Whether upon the true construction of the Will of Tan Yean Neo, deceased, dated 31st day of March 1927, the testatrix mentioned in the Statement of Claim herein, the above named third, *fourth*, fifth, *sixth* and seventh plaintiffs or any of them are beneficiaries under the said Will.

In the course of the hearing of this summons, Dr. Withers Payne (for the 2nd and 3rd defendants) asked the Court to delete the words "fourth" and "sixth" from the prayer, as he now admits that these two infant plaintiffs are beneficiaries under the will. This was accordingly done, but without preiudice to any question of costs, arising from the inclusion of these two plaintiffs in the summons.

As another preliminary; the second plaintiff, who besides suing on his own behalf, also sued as next friend to the third (infant) plaintiff, having been adjudicated bankrupt on the 17th March, 1937, it was agreed by Mr. Morrison (for the plaintiffs) at the suggestion of Dr. Withers Payne, that the first plaintiff should represent the third plaintiff for the purposes of this summons; and it was ordered that a representative order to this effect should be embodied in the formal order to be made in this summons.